IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 243

UNITED MINE WORKERS OF AMERICA, *Petitioner*,

v.

PAUL GIBBS

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

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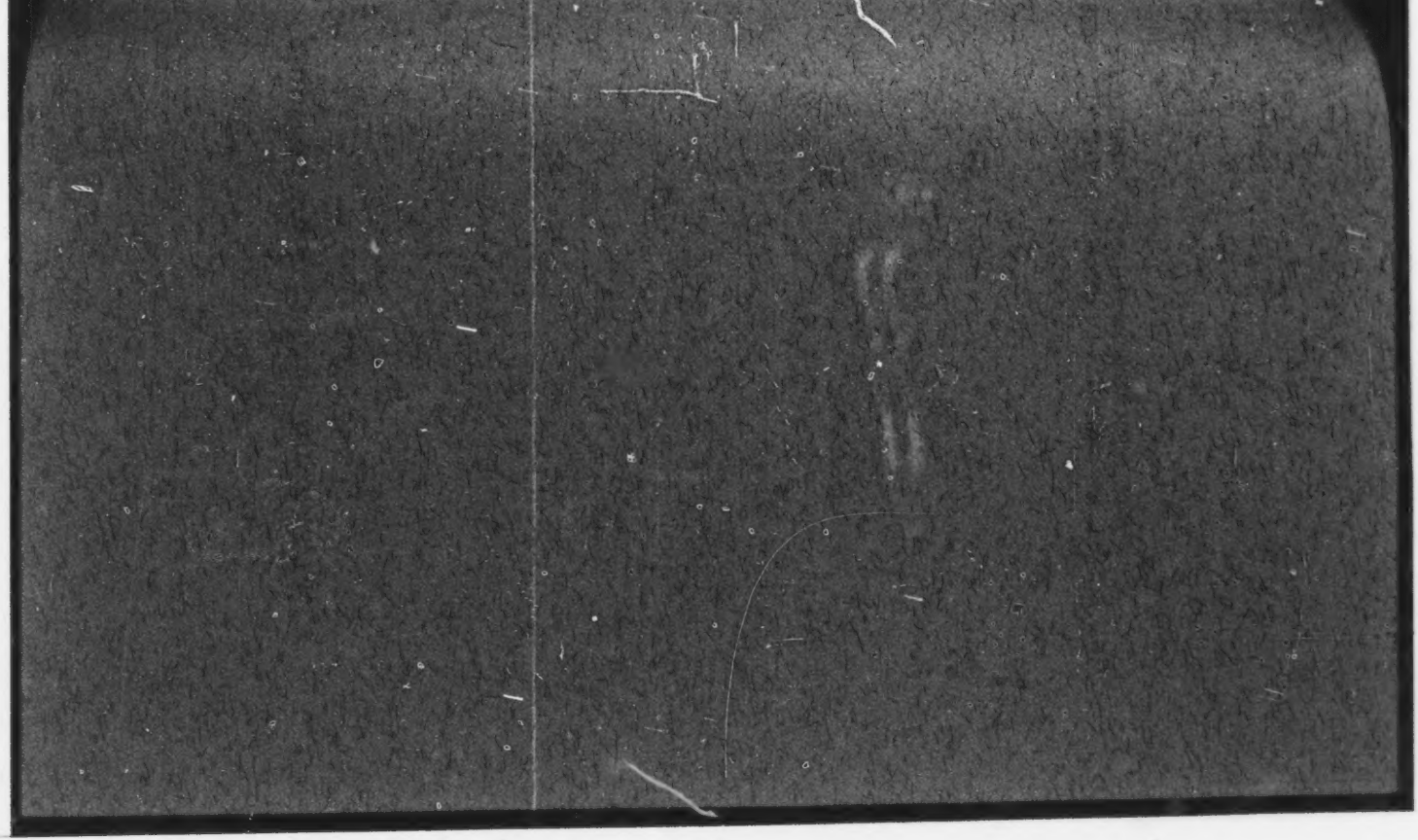

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REPLY TO THE COUNTER-STATEMENT OF FACTS AND TO GIBBS' ARGUMENT OF QUESTION ONE

The issue presented by Question One is UMW's responsibility for picket line misconduct, which is discussed in Gibbs' Counter Statement of Facts and in Gibbs' argument of Question One. The Sixth Circuit

predicated UMW's liability in part on a finding that UMW Field Representative Gilbert was present at the time of the misconduct. The clearly erroneous nature of this finding is discussed in UMW's petition at pages 9-11, and particularly in footnote 6. *It is noted that nowhere in Gibbs' reply is this crucial finding of the Sixth Circuit defended or even mentioned.* Contrary to the Sixth Circuit's finding, Gilbert was not present on the occasion of the misconduct, as Gibbs has tacitly admitted heretofore.

REPLY TO GIBBS' ARGUMENT OF QUESTION TWO

Gibbs states at page 4 of his brief that "The Court felt counsel's argument improper but when viewed on the record as a whole, was not prejudicial." Gibbs states at page 5 that "The District Court was of the opinion that the jury's verdict was excessive in view of the evidence . . .".

Clearly this is a misconception of the decisions of both the District Court and the Court of Appeals. The District Court expressly found the closing argument an appeal to prejudice (56a) and not only in light of the evidence *but because of that argument* the Court suggested a remittitur in the punitive award. The Court of Appeals, in considering the District Court's opinion, agreed that the argument was improper and that it related to the size of the verdict "without affecting the determination on the merits". These statements cannot be reconciled with Gibbs' assertion that the remarks were improper but not prejudicial.

Because the remarks of counsel were prejudicial and were found to have had an adverse effect on the jury and its verdict, UMW submits that it is entitled to a

new trial at which all issues may be considered and determined free from an appeal to prejudice.

REPLY TO GIBBS' ARGUMENT OF QUESTION FOUR

UMW contends that the verdict for damages, which was upon two theories, may not be sustained where it was subsequently determined that one theory was erroneous and where it is impossible to determine which theory, or to what extent each theory prompted the verdict on the damage issue.

Gibbs contends that UMW has waived its right to assert this question in that it did not object to the interrogatories as not correctly presenting the issues.

The record shows, however, that the District Court prepared this verdict form on its own motion, and took pains to explain to Gibbs' counsel, who had expressed preference for a general verdict, why it was to his advantage to have a special verdict on the issue of liability. (The District Court's remarks to Gibbs' counsel appear in the Certified Record immediately following p. 521a, marked "Appendix A" and are also appended hereto as Appendix A for the convenience of the Court).

The cases cited by Gibbs, *Safeway Stores, Inc.* v. *Dial,* 311 F. 2d 595 (5th Cir. 1963) and *Penn* v. *Glenn,* 265 F. 2d 911 (6th Cir. 1959) are not in point, for the inconsistency in the verdict does not arise simply from the verdict form or the verdict as rendered. The inconsistency became apparent after the District Court set aside one of the two grounds on which the general verdict for damages was based. When the balance of the verdict is considered apart from that portion which was found to be contrary to the law, the rule of *Sunkist Growers, Inc.* v. *Winckler and Smith Citrus Products*

Co., 370 U.S. 19, becomes applicable and entitles UMW to a new trial.

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APPENDIX A

The following is a part of the discussion between the Court and counsel on the special verdict form. The court is speaking to Mr. Van Derveer, attorney for the plaintiff (Appendix E, pp. 30-31, Chambers Hearing of November 13, 1962):

"The Court: Well, here's your problem, Joe. Now, I realize that you do not look with favor of special issues, but I think that you're so familiar with the state practice that you overlook the fact that in the federal rule—the federal court the rule is different. And that is one the—in the federal courts, a general verdict—in the state courts, a general verdict if it can be supported by any theory is supported. In the federal courts where it's a federal question involved, a general verdict unless it can be supported by all theories, has to be reversed and sent back. So we're going to have to work out special issues here that will tie down the issues sufficiently that we know what the jury has decided. If you don't, and you get up to the court of appeals on the question, then if there is any theory upon which there is no evidence, then the general verdict must be reversed and sent back. Now, I don't know whether you've been aware of the difference in that respect or not, but in any event, that seems to be the federal rule. And for that reason, it's going to be highly desirable, if we're going to get this law suit settled once and for all and not have to retry it, possibly, to get these special issues pinned down. And one issue is which one of these things is it that the defendant committed. Now, I can submit to the jury all three of them, namely that the defendant—whether the defendant did or did not engage in this, whether the defendant did or did not induce, encourage, whether the defendant did or did not threaten or coerce.

"Mr. Van Derveer: Well, I thought your Honor, of course, was referring to the charge, but your Honor is also referring to the charge and the special issues.

"The Court: What I have in mind—both of them . . .

"Mr. Van Derveer: Now, it seems to us that on the special issue, that if that is the intent of the Court, that it should be just in the exact words of the statute. Did the union quote 'engage in, induce or encourage' . . .

"The Court: Well, I think we are going to have to submit those issues separately, because suppose I submitted engage in, induce or encourage, and then the jury comes back and finds 'Yes.' And then suppose when they examine the proof carefully, or the Court of Appeals examines the proof, they say well, now there is evidence which you might hold that they induced or encouraged, but there is no evidence that they engaged in. So therefore, we'll have to send this case back for re-trial.